

Town of Amherst
Zoning Board of Appeals
Appeal of a Decision of the Building Commissioner
DECISION

Applicant: George Spence, P.O. Box 9672, North Amherst, MA 01059

Date Application filed with the Town Clerk: March 22, 2007

Nature of request: Petitioner seeks to appeal a decision of the Building Commissioner, under Section 10.1 of the Zoning Bylaw, to remove the Cease and Desist Order dated February 13, 2007, and any penalties issued thereunder.

Location of property: 324 Northampton Road, Map 13D, Parcel 26, R-N zone.

Legal notice: Published in the Daily Hampshire Gazette on April 11 and April 18, 2007, and sent to abutters on April 10, 2007.

Board members: Ted Rising, Russ Frank and Jane Ashby

Submissions: The applicants submitted the following documents:

- Letter dated March 9, 2007, from Attorney Lawrence J. Farber to the Town Clerk of Amherst, regarding the appeal of the decision of the Building Commissioner;
- Letter dated March 9, 2007, from Attorney Lawrence J. Farber to the tenants of 324 Northampton Road regarding a 30-day Notice to Quit;
- Letter dated February 13, 2007, from Mark A. Snow, Assistant Building Commissioner, to George Spence regarding 324 Northampton Road Violations;
- Letter dated April 13, 2007, from Attorney Lawrence J. Farber to Edward Rising, Chair, Amherst Zoning Board of Appeals, regarding a request for continuance;

Town staff submitted the following documents:

- Transmittal from Tom Dion, Health Department, dated April 2, 2007, with copy of 105 CMR 410.000 – Definition of a Rooming House.

Site Visit: May 15, 2007

At the site visit the Board was met by the applicant's brother, Marvin Spence. The Board observed the following:

- The property is located on a heavily-traveled road (Northampton Road/Route 9);
- The property is large and abuts the Norwottuck Rail Trail to the west and south;
- The house is surrounded by a parking lot and by an open lawn and trees;
- The parking lot is large enough to contain approximately six cars;
- The exterior of the house is in fair condition.

The Board also observed the following in the interior of the house:

- On the first floor there is a kitchen, a living room, a single bathroom adjacent to the kitchen and two entry doors, a front door and a side entry door;

- One bedroom is on the first floor;
- Three bedrooms are on the second floor;
- Another (a fifth) bedroom is located on the ground floor, one step down from the kitchen, in an addition at the rear of the house that appears to be a converted porch.

Public Hearing: April 26, 2007

At the public hearing Mr. Rising read a letter from Attorney Lawrence Farber, the applicants' attorney, requesting a continuance of the hearing because Mr. Farber was not available to attend.

Mr. Frank MOVED to continue the public hearing to May 17, 2007. Ms. Ashby SECONDED the motion. The Board VOTED unanimously to continue the public hearing.

Continued Public Hearing: May 17, 2007

At the public hearing Lawrence J. Farber, attorney for the applicant, presented the petition. He made the following comments:

- His client was seeking relief from the penalty and enforcement of the Building Commissioner's Cease and Desist Order;
- The Cease and Desist Order was based on the Zoning Bylaw which prohibits more than four unrelated people from living together in one dwelling unit;
- The Bylaw is illegal and his client disagrees with the enforcement of the Bylaw;
- The Bylaw does not place a limit on related individuals living in one dwelling unit and therefore it is not based on the issue of "congestion"; the Bylaw would allow more people to live in the house if they were related to one another;
- The definition of family has changed drastically in the last few years;
- A requirement that tenants be married to each other is not constitutional; (Mr. Farber referred to the "Goodrich case");
- People should be allowed to live with whomever they wish;
- Mr. Farber referred to the anti-discrimination clause in Mass. General Law, Chapter 151B;
- He also referred to the right of association, to the definition of a "family", and again to Chapter 151B which precludes landlords from discriminating on the basis of family status;
- Tenants can sue landlords if landlords do not allow tenants to live together; this puts landlords in a difficult position;
- The Spences are longstanding owners of this property;
- The unit has not been cited for noise complaints by these tenants;
- The only violation of the Zoning Bylaw cited in the Building Commissioner's letter was that five (5) unrelated people were living in the unit;
- The Zoning Board of Appeals has three (3) options on how to proceed with this case:
 - The Board can approve a Special Permit for the property and thereby allow five people to live in one unit;
 - The Board can make no decision since the case will be moot at the end of the month when the tenants move out;
 - The Board can uphold the Bylaw and the applicant may then bring the matter to court.

Mr. Farber stated that he believed that the Bylaw was unconstitutional because it violates the right of people to congregate.

Mr. Frank asked if the tenants would be moving out at the end of the month. Mr. Farber stated that they would be moving, but that the applicant may still petition the court to hear the case even if it is moot.

Mr. Frank asked if Mr. Farber considered the Bylaw to be unconstitutional in all instances. Mr. Farber stated that the Bylaw was unconstitutional in all instances because it violates the following:

- The anti-discrimination clause;
- The right of people to congregate and the right of people to live together.

Mr. Farber stated that the number of people in the house is small (five instead of a larger number). The landlords have been members of the community for a long time and there have not been problems with this property. The tenants themselves called the Board of Health regarding repair issues. The repair issues that were cited in the Building Commissioner's letter were taken care of.

Mr. Rising asked how long these five people had been living together. Mr. Farber stated that they have been living together since September and that they have a one-year lease.

Mr. Rising asked if any of the tenants were married to each other. Mr. Farber stated that he didn't know if they were married since it is illegal to ask about marital status.

Bonnie Weeks, the Building Commissioner, stated that the Building Commissioner is the enforcement officer of the Zoning Bylaw. The Zoning Board of Appeals has the authority to judge whether the enforcement officer has enforced the Bylaw appropriately.

Mr. Farber stated that he was not suggesting that the Building Inspector enforced the Bylaw improperly but that the Bylaw itself was wrong.

Richard Gold and Marie Desch of 55 Sand Hill Road spoke about the application. They have owned five buildings in Amherst and have rented apartments to more than four unrelated individuals. They were given a Cease and Desist Order for exceeding the limit of four unrelated people in one unit. They appealed it. The semester ended and the Town decided not to enforce the Cease and Desist Order in their case.

Mr. Gold stated that it is important for landlords to have all of the tenants' names on the lease. Some landlords rent to four people and then allow the tenants to sublet rooms. In those instances the owners don't know who lives in the house.

Mr. Gold stated that the Bylaw limiting the number of tenants takes away the power of the landlord to control his own property. Mr. Gold suggested that all of the owners with more than four tenants per unit could apply for variances from the Zoning Board of Appeals. Mr. Gold stated that in his opinion the Building Inspector acted inappropriately and that the Bylaw would probably be rejected by the Attorney General if it were adopted today. He urged the Zoning Board to overturn the action of the Building Commissioner.

Ms. Ashby MOVED to close the evidentiary portion of the public hearing. Mr. Frank SECONDED the motion. The Board VOTED unanimously to close the evidentiary portion of the public hearing.

Public Meeting – Discussion

At the public meeting the Board discussed the application. Ms. Ashby stated that she understands that the Building Inspector applied the Bylaw as it currently stands. Mr. Frank stated that he agreed with Ms. Ashby. He went on to say that the Zoning Board's job was to review the Bylaw and to decide whether the Building Commissioner had applied the Bylaw correctly. Mr. Frank stated that the Zoning Board of Appeals is not the proper body to decide on constitutional issues.

Mr. Rising asked if there had been any complaints regarding noise or rowdiness at the property. Ms. Weeks stated that she had not done any research on this matter.

Mr. Rising stated that, in his opinion, the property contained a lot of space and that the property itself might make this an appropriate location for a five-tenant household. Mr. Rising further stated that he had certainly considered this, although, on balance, he was not in favor of the application.

Ms. Ashby stated that, in her opinion, the interior space of the house was not appropriate for five tenants.

Public Meeting – Zoning Board Decision

Mr. Frank MOVED to deny the application to overrule the decision of the Building Commissioner. Ms. Ashby SECONDED the motion.

The Board VOTED unanimously to DENY the application to overrule the decision of the Building Commissioner, under Section 10.1 of the Zoning Bylaw, at 324 Northampton Road, (Map 13D, Parcel 26, R-N zone).

EDWARD RISING

RUSSELL FRANK

JANE ASHBY

FILED THIS _____ day of _____, 2007 at _____,
in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2007.

NOTICE OF DECISION mailed this _____ day of _____, 2007
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2007,
in the Hampshire County Registry of Deeds.